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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-41

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

and

LOCAL UNION NO. 823, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

BILLY G. BUTLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioner, Local 823, Teamsters, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit finding that the Union had breached its statutory duty of fair representation toward Butler and assessing compensatory damages of $6,500 for such breach. The Court of Appeals affirmed the judgment of the District Court in each respect.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported, but the relevant portions thereof are printed in Appendix A, attached hereto. The opinion of the District Court on petitioner's motions after verdict is reported at 374 F. Supp. 747 (W.D. Mo. 1974) and is set forth in relevant portion in Appendix B, attached hereto.

STATEMENT OF JURISDICTION

On April 9, 1975, the Court of Appeals denied petitions for rehearing en banc filed by both Local 823 and Yellow Freight System. [See petition for certiorari of Yellow Freight System, Inc., Appendix C, A.26.] The Court's initial opinion was entered on March 18, 1975. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Whether, as a matter of law, the Local Union leadership did not breach their duty of fair representation when they resolved a conflict over scarce job opportunities following the merger of two trucking firms, by advocating (before an adjudication tribunal) the right of the more numerous previously employed workers of the acquiring Company to have preference over the less numerous transferred workers of the acquired Company in the choice of runs leaving a terminal of the acquiring Company?

STATUTORY PROVISION INVOLVED

Labor-Management Relations Act § 301 (29 USC § 185):

Suits by and against labor organizations—Venue, amount and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter, and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301 61 Stat. 156.

STATEMENT OF THE CASE

Billy Butler and Local 823 were participants in a zero-sum game. To the extent that Butler "won" the right to first pick of the more remunerative trucking runs leaving the Yellow Freight System, Inc. terminal at Baxter Springs, Kansas, to that extent another truck driver, a Local 823 member, employed by Yellow Freight System at the same location, "lost" access to relatively greater income opportunities. The jury, the District Court, and the Court of Appeals found that the leadership of the Local Union had breached their duty of fair representation because they chose to support the claims of the truck drivers who had been employed by Yellow Freight at Baxter Springs for a longer period than Butler. In short, the Local chose to advocate the wrong principle for allocating a scarce

resource upon which more claims were made than could be satisfied, or so the decision-makers below would have it.

In March of 1965, Yellow Freight received temporary authority from the Interstate Commerce Commission to acquire and manage Watson-Wilson Transportation Company.[1] Permanent authority to acquire Watson-Wilson through purchase of stock and physical capital was granted by the ICC in May or June of 1966.[2] Temporary authorization to "merge" operating authority was sought in October of 1966.[3] Permanent merger of operating authority came on December 9, 1968.[4]

From March of 1965, Yellow Freight effectively managed Watson-Wilson and in a functional economic sense, integrated that firm into the operations of Yellow Freight.[5] Yellow Freight reordered the flow of transportation service throughout both systems with a view toward increasing the efficiency and profitability of the integrated operation.[6] As a result, certain "old" terminals of Watson-Wilson were closed or experienced a reduction in demand and some 350-400 Watson-Wilson drivers found themselves out of work.[7]

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[1] R117-120, 376. [All page references are to the trial transcript.] Watson-Wilson although technically "solvent" (in that sense that it was not facing bankruptcy or receivership) was on hard times. Many workers, including Butler, were on layoff, before the merger process began. 394, 504, 466.

[2] R376, 611, 948-950.

[3] R120, 376, 612.

[4] R120, 376, 377.

[5] R376, 377, 466-468.

[6] R394-395, 402, 406-410, 455-459, 504.

[7] R394-395, 402, 406-410, 455-459, 504.

What was to be done with these workers, all of them members of the Teamsters International Union, albeit being members of different Locals within the International?[8]

Pursuant to Sec. 3, para. (8) of Article 5 of the relevant labor contract,[9] the affected local unions and the trucking companies presented the matter of the drivers job failures to the Change of Operations Committee, a decision-making body created by the contract whose job it was "to add to or to modify these rules [seniority principles] in specific situations presented to it" when, *inter alia*, a merger of solvent companies created a demand for work opportunities in excess of the supply of relatively higher paid jobs.[10]

On June 16, 1965, the Change of Operations Committee decided that all Watson-Wilson workers "displaced" by the merger within certain geographical areas "shall be placed on a master seniority [list] with the original date of hire, regardless of the terminals they may have worked in where they accumulated only terminal seniority . . ."[11]

The Committee also extended the period of time in which these people could exercise their seniority rights, whatever they might be, to 5 years from 2 years from date of layoff.[12]

In the text of the decision, the Committee said nothing about the uses to which this master seniority list would be put, assum-

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[8] R400, 404-405, 402. See Appendix D, App. p. A-11, the Change of Operations Committee decision.

[9] The 1964-1967 National Master Freight Agreement with Central States Area Over-the-Road Supplement. Appendix E, App. p. A-18.

[10] Article 5, Sec. 3, para. (8) of Appendix D, App. p. A-11.

[11] See para. 1, Appendix C, App. p. A-10; R395-402.

[12] See para. 3, Appendix C, App. p. A-10.

ing that the displaced drivers got jobs at other terminals of the integrated system where work might be available. Local 823 made its position clear before the Committee in June of 1965: Any displaced worker who was allocated to any terminal in its jurisdiction was to have "terminal seniority" for the purpose of bidding runs—a position the local consistently maintained at all relevant times.[13]

Yellow Freight proceeded to implement the Committee decision, as it saw its terms. The Company determined where additional workers were then needed within the integrated systems.[14] Then it sent the displaced workers a letter, or "bid sheet" asking them to order their preferences for available work.[15] If the worker was the most senior bidder for an opening, he got the job.[16] The driver was given credit for time worked for Watson-Wilson, for the purpose of bidding runs at the Yellow terminals, but if and only if he had sufficient relative seniority at Watson-Wilson to have successfully bid into a Yellow terminal during the first round of bidding commenced in June of 1965.[17] Thereafter, the worker could be allocated to jobs at terminals as de-

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[13] R120-122, 158-159, 162, 171-172, 182-184, 252, 253, 278, 279, 378, 379, 380, 652-653, 662, 665-667, 670, 678, 701-702, 704, 711-712, 715, 716, 717.

[14] R394-395, 406-410, 455-459, 504.

[15] R406-410, 436-437. See also Appendix F and G, App. pp. A-26, A-28.

[16] R410, 411, 416-417, 426-431, 436-437.

[17] R410-411, 416, 426-428, 431, 436-437, 458, 462-463. Yellow added one caveat: If in the first round a worker bid into a location which did not generate sufficient work to keep him employed, or employed at a level of expected income, he could, within 60 days of the original bid, take a "layoff" at the bid location, and transfer into some other terminal where work was available, and he was more senior than any other bidder. He would be employed at the second terminal with a credit for all time worked at Watson-Wilson for all purposes, including bidding runs. R306-316, 319-324, 325-331, 472-473, 38-39, 41-46, 58-60.

mand for labor increased and he was the most senior bidder. However, for the purpose of bidding runs out of the terminals, he would have terminal seniority only. That is to say, he would have to rely upon his date of hire at the Yellow terminal unaugmented by a credit for work performed at Watson-Wilson.[18] He could, however, utilize the Watson-Wilson credit for computing the length of his paid vacation and the value of his pension claims.[19]

Local 823 continued its opposition to permitting displaced Watson-Wilson drivers to use their seniority with that firm for the purpose of bidding on freight runs now originating from the Yellow Freight terminal in Baxter Springs.[20]

During the period from June 1965 to January 1966, 17 Watson-Wilson drivers bid into openings at the Yellow Freight terminal in Baxter Springs either in the first round of bidding in June, or within 60 days of an initial bid into another location which then did not provide sufficient work.[21]

Local 823 (while not objecting to a credit for time worked at Watson-Wilson for the purpose of computing fringe benefits) did oppose such credit for the purpose of bidding runs.[22] At the Yellow Freight terminal in Baxter Springs, as at all locations covered by the Central States Area Over-the-Road supplement to the National Master Freight Agreement, the

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[18] R410-411, 416-417, 426-431, 436-437, 446-447, 458, 462-463.

[19] R410-411, 416-417, 426-431, 436-437, 446-447, 458, 462-463.

[20] R652-653, 715, 716-717.

[21] R38-39, 41-46, 58-59, 446-448. These drivers constituted about 10% of total driving force at Baxter Springs as of December 16, 1966. 17.193—See Plaintiff's Exhibit 38.

[22] R652-653, 716-717.

income of a regular truck driver is directly proportioned to miles traveled, and weight of the commodity transported.[23]

Accordingly, the labor contract provides that all runs and new positions are subject to seniority and shall be posted for bids.[24]

As Local 823 saw the matter, first choice on the longest, heaviest runs originating from the Yellow terminal, should go to those workers who had been employed by Yellow at that terminal for the longest period of time simply because the highest income earning opportunities within the Yellow Freight system should be available to those who had worked longest for Yellow.[25]

At first, there was little need to choose a principle for allocating the scarce resource. Because the operating authority of each firm had not been temporarily or finally merged with ICC approval (nor had Yellow been given permanent authority to even acquire the stock and physical capital of Watson-Wilson) the Watson-Wilson drivers took runs only on Watson-Wilson operating authority which did not parallel the authority of Yellow Freight System.[26] Yellow Freight drivers worked

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[23] R158-159, 161, 208-215, 261-262, 557-559, 561-562, 576-577, 579-580.

[24] Appendix D and E, Article 41, Sec. 2, App. pp. A-17, A-25.

[25] R158-159, 208-215, 261-262, 653, 715, 716-717.

[26] The transferred Watson-Wilson drivers made runs through Amarillo, Texas to destinations West and Southwest of Amarillo, all within Watson-Wilson's operating authority. They would not shuttle between Amarillo and Baxter Springs because the Company authority permitted movement to Amarillo only as part of a longer journey to a destination West and Southwest of that City. R65, 67, 432-438, 468, 496-497, 653-657.

the runs on Yellow's authority.[27] Although all drivers worked out of the same terminal, functionally, they were operating as if no integration of the firms had occurred. There were separate seniority lists for allocation of work within each separate operating authority.[28]

But in the Fall of 1966, the 17 Watson-Wilson drivers who bid into the Baxter Springs Yellow terminal pressed for the right to bid on all runs, using their Watson-Wilson service credit for this purpose.[29]

Local 823 maintained its position that the best work opportunities at the terminal should be offered to the people longest employed by Yellow Freight at that work location.[30]

After some of the Watson-Wilson drivers filed charges with the NLRB and grievances under the labor contract, the Change of Operations Committee convened in Chicago and concluded that all 17 drivers were entitled to bid all runs from Baxter Springs on the basis of the Watson-Wilson service seniority credit.[31]

Even then, Local 823 continued to resist a seniority credit for those Watson-Wilson drivers who had originally bid into a terminal other than Baxter Springs, but had been subsequently transferred to that location within sixty days of their arrival at

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[27] R432-438, 468, 496-497, 653-657, Yellow drivers would shuttle between Amarillo and Baxter Springs. But Yellow's authority did not permit movement west of Amarillo.

[28] R468, 496-497, 653-657.

[29] R125-127, 130-137, 151, 154, 324-325, 347-359, 446-447.

[30] R120-122, 158-159, 162, 171-172, 182-184, 252-253, 278-279, 378-380, 652-653, 662, 665-667, 670, 678, 701-704, 711-717.

[31] R125-127, 130-137, 151, 154, 324-325, 347-359, 446-448, 466-467, 474, 475-477, 502, 508-510.

the terminal of their first choice because there wasn't enough work for them at their preferred work site.[32] Local 823, grudgingly "went along" when Williams, a Teamsters official who was a member of Change of Operations Committee, informed Kitts, an official of Local 823, that indeed, the Committee intended to give all Watson-Wilson drivers working in the integrated system as of September 1966, full credit for the time worked at Watson-Wilson, when they bid on runs flowing out of the Yellow Freight terminal in Baxter Springs.[33]

Butler arrived in Baxter Springs in March of 1967 after Yellow apprised him that work was available.[34] Not surprisingly, officials of Local 823 informed him that although he would get a credit for his prior service with Watson-Wilson for the purpose of computing his vacation, he would have to rely on his seniority at Baxter Springs for the purpose of bidding runs.[35] The Union was determined that those peope who had put in the most time for Yellow Freight at that terminal would get first "dibs" on the relatively richer runs. At first Butler accepted these terms of employment.[36] Then he got to talking to the former Watson-Wilson drivers.[37]

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[32] R701-702, 704, 706, 711-712.

[33] R701-706, 711-712, 935.

[34] R120, 121, 122, 158-159, 162, 183-184, 252, 253, 278, 279, 381-382, 665-666. Yellow Freight concurred in this judgment. R162-165.

[35] R107-109, 432.

[36] R221-222, 252, 664-665. As Butler acknowledged, his local union at the terminal at which he worked when employed by Watson-Wilson had told him that the "master seniority list" created by the Change of Operations Committee decision of June 16, 1965 was to be used simply for the purpose of obtaining employment at Yellow Freight terminals should work become available. Yellow had to pick persons from the list before going to the general labor market pool. R223-226, 263, 267, 271. Butler, on his arrival, had no expectation of a seniority credit for bidding runs at Baxter Springs.

[37] R268.

When he discovered that all of his former colleagues at Watson-Wilson had received a seniority credit for all purposes at the Yellow terminal, he wanted the same treatment.[38]

Kitts, a Local Union officer, explained to him that because he had not bid into Baxter Springs during the first round of bidding in June of 1965, he was not entitled to a seniority credit for the purpose of bidding on runs at the Baxter Springs terminal.[39] Webb, another Union official, expressed the same view, and "guaranteed" Butler that he would lose any grievance he submitted to the Joint Area Committee for consideration.[40]

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[38] R673-674.

[39] R283-284, 377-379, 381-382, 670. At trial, there was a dispute as to whether Butler had indicated a preference for Baxter Springs as of June 30, 1965. R84, 90, 226-227, 260, 283-285, 520-556. See Appendix F, App. p. A-26. There was no dispute that he had inlicated such a preference as of August 5, 1965. See Appendix G, App. p. A-28. But this dispute is not relevant to an evaluation of the Union's performance of its duty to fairly represent Butler. There is no dispute that under no circumstances did Butler have sufficient relative seniority at Watson-Wilson to bid into openings at Baxter Springs even assuming he expressed his preference as of June 30, 1965. More senior drivers at Watson-Wilson filled all the openings at Baxter Springs during the first round of bids. R375, 378-379, 381-382. R429-431, 458. At all times, Local 823 took the position that anyone who was not on the Yellow payroll as of the first round of bidding in June of 1965, including those who transferred when their first bids aborted, was not entitled to a "Company" seniority credit for bidding runs, 377-379, 381-382. If that stance does not violate the duty, there is no liability even if Butler did bid Baxter as of June 30, 1965, given the fact that such bid would not have been successful because of his relative seniority. [R375, 378-379, 381-382, 429-431, 458.] On the other hand, if such position does violate the duty, there is a liability even if Butler declined Baxter Springs in June of 1965. He was on the payroll as of March 1967, the first time he could possibly have been hired as all parties agree and the Court of Appeals found. See fn. 13, Appendix A, App. p. A-1. The issue is how should the Union have treated his claim for a Watson-Wilson earned seniority credit at that time. That issue remains. However, the jury resolved the question of when he initially expressed a preference for Baxter Springs —June or August 1965.

[40] R162.

Butler persisted. In August of 1967, Kitts presented his claim to the Kansas-Missouri Area Grievance Committee, composed of an equal number of management and union representatives, including Mr. Webb, an officer of Local 823.[41] The Area Committee concluded that Yellow Freight's decision to grant Butler a seniority credit for fringe benefits only "comply[ied] with the change of operations decision."[42]

As the Court of Appeals concluded, the jury could properly decide that although Kitts formally presented Butler's claim for a seniority credit, the Local, through Kitts and Webb, effectively took the position before the Area Committee that since Butler was not employed at Baxter Springs at the end of the first round of bidding in 1965, or at the time of the second operations committee decision in the Fall of 1966, he was not entitled to a seniority credit in March of 1967.[43] This failure of advocacy violated the Union's duty of fair representation because the Union officers were motivated by a desire to satisfy the needs of the more numerous Yellow Freight drivers who had been previously employed at Baxter Springs, and who had let it be known in no uncertain terms that they did not want their income opportunities diminished because of "outsiders" from Watson-Wilson.[44]

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[41] R419-424, 426-427, 490, 491, 591, 594, 631, 632, 638-639, 641, 673-674, 717-718. Under both the 1964-67 and 1967-70 labor contracts, it was the function of the Area Grievance Committee to "mutually agree to such disposition of the seniority problems as in their judgment is appropriate under the circumstances" when the "parties acknowledge that specific situations may arise which may not be covered by the above rules [seniority allocation on merger of solvent firms] or in which the parties may feel that different treatment of the problem is necessary". Sec. 3(8) of Article 5 of the 1964-67 contract. Sec. 7 of Article 5 of the 1967-70 contract. See Appendix D, App. p. A-11; Appendix E, App. p. A-18.

[42] Defendant Yellow Freight Exhibit 50. R609.

[43] Appendix A, App. p. A-7, fn. 18.

[44] Appendix A, App. p. A-1, R653, 716-717.

But in light of what principles of statutory and decisional labor law can it be maintained that a Local Union violates the duty of fair representation when it seeks to vindicate the principle of terminal seniority for the allocation of bids run upon a merger of two firms before tribunals which by contract are to exercise "appropriate judgment" in "specific situations presented" to them?

REASONS FOR GRANTING THE WRIT

I. The Determination of the Court of Appeals That the Local Union Violated the Duty of Fair Representation (Simply Because It Affirmed the Interests of an Aggressive Majority of Workers as Against a Minority in a Situation Where Neither Class Could Be Fully Satisfied, and Neither Class Could Claim Reliance Upon Reasonable Expectations Predicated Upon the Labor Contract) Is Inconsistent With the Decisional Law of This Court Which Holds That Consistent With the Duty of Fair Representation, the Union, as a Political Institution, May Choose Between the Competing Claims of Its Constituency Provided Such Choice Serves the Needs of the Membership Considered in Aggregate and Such Choice Does Not Impose Burdens on Members Because of Their Race, Sex, or Internal Union Political Allegiances.

A. The Union as a political institution

This Court has recognized that the trade union serves as the workers' political tool for gaining a measure of control over their work lives. By relating to one another through the mechanism of the Union (thus controlling the supply of their services) people who exchange their labor for compensation can increase their bargaining power vis-a-vis those relatively fewer people who own and control the production processes in which workers labor.[45] These observations are the foundation of the

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[45] *Emporium Capwell Co. v. Community Organization*, 420 US 50, 61-65, 67-70 (1975); *Labor Board v. Weingarten, Inc.*, 420 US 251, 260-262, 265 fn. 10 (1975); *Labor Board v. Allis-Chalmers Mfg. Co.*, 388 US 175, 180-181 (1967); *American Shipbuilding v. Labor Board*, 380 US 300, 316 (1965).

Labor-Management Relations Act, which in turn is the basic source of labor policy within the labor law system.[46]

Like all other political persons, union leadership finds it impossible to satisfy the needs of all members of the constituency simply because of a scarcity of resources. If people claiming the highest paying jobs are more numerous than the jobs, as is the case here, someone must lose. This Court has consistently recognized that the Union may make hard choices provided that the principle of allocation serves the needs of the members in aggregate and in the long run and such choice does not represent the acting-out of racial or sexual preference, or reprisals against internal Union political enemies.[47] More specifically, the Court had held that unions may deviate from the principle of length-of-service seniority in allocation of limited job opportunities if such deviation serves the long-run needs of the class or affirms a value which has broad community support.[48]

Although there was no evidence that Butler, a white male with no previous contact with Local 823, was the object of "hostility" arising out of his personal traits, the Court of Appeals

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[46] See cases fn. 45, *supra. Boys Markets v. Retail Clerks Union*, 398 US 235, 242, 245-246 (1970); *AVCO v. Machinists*, 390 US 557. 559-560 (1968); *Vaca v. Sipes*, 386 US 171, 177, 185-188, 191-193 (1967).

[47] *Emporium Capwell Co. v. Community Organization*, 420 US 50, 62-65, 67-69, 70 (1975); *Vaca v. Sipes*, 386 US 171, 177, 182, 189-195 (1967); *Motor Coach Employees v. Lockridge*, 403 US 274, 299 (1971); *Labor Board v. Allis-Chalmers*, 388 US 175, 180-181 (1967); *Humphrey v. Moore*, 375 US 335, 346-350 (1964).

[48] *Ford Motor Co. v. Huffman*, 345 US 330, 334-335, 337-342 (1953), (preemployment seniority credit for military service); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 US 521, 523-524, 527-529 (1949), (seniority credit for union officers unrelated to length of service in the firm). See generally, *Humphrey v. Moore*, 375 US 335, 346-350 (1964).

concluded that the jury could reasonably find that the Union "gave in" to the angry pressures it was receiving from the Yellow Freight "old-timers" at Baxter Springs who wanted first opportunity to choose all runs flowing from that terminal and greatly outnumbered the Watson-Wilson drivers.[49] So be it.

But the logic of the decisional law does not fault a Union leader who when confronted with competition for limited job opportunities, who affirms the position of the majority of his members where such action does not reduce net benefits for the class of workers he represents; his action can strengthen the position of each member of the class, and the minority member or members cannot claim reliance upon a clear contract right.

B. No Net Loss to Members of the Class Considered in the Aggregate

The position taken by Local 823 simply distributed money from the transferred Watson-Wilson drivers to the already domiciled Yellow drivers. No value was destroyed. The aggregate compensation for the class of all drivers at the Baxter Springs terminal remained the same. Had the Union urged that members of the class of transferred drivers forfeit their Watson-Wilson seniority for the purpose of computing their fringe benefits, the leadership would have been hard pressed to justify that decision which would have reduced that aggregate compensation for their total constituency. But Local 823, acting through Kitts and Webb, at all times maintained that Butler, and the other Watson-Wilson drivers should receive a seniority credit for the purpose of computing their vacation pay and other fringes.[50] Since the transaction was zero-sum, one group had to lose what the other gained, there is no principled basis on which the allocation could

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[49] Appendix A, App. p. A-1. R378-379, 652-662, 653, 715-717.

[50] R120-122, 158-159, 252-253, 278-279, 381-382, 665-666.

be made, and hence the Union could not be acting "arbitrarily" or irrationally, unless Butler and the other Watson-Wilson drivers had a reasonable expectation that pursuant to the contract they were entitled to a seniority credit for past service with the acquired firm. But the text of the contract indicates that such reliance would not be reasonable.

C. Since the Text by the Labor Contract Does Not Unambiguously Confer a Right to a Seniority Credit for Work Previously Performed at Watson-Wilson for the Purpose of Bidding Runs at the Yellow Freight Terminal, Butler Cannot Claim That the Local's Advocacy of a Contrary Position Before the Area Committee Arbitrarily Deprived Him of a Reasonable Expectation Upon Which He Relied When He Came to Baxter Springs

We acknowledge that a trade union acts "arbitrarily" if it advocated a position before an adjudicatory tribunal created by the contract[51] which is detrimental to the interests of some of its members and is flatly contradicted by the language and logic of the written contract. Workers can rely upon their Union to affirm rights firmly secured by ratified contract.[52] But the Master

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[51] The Kansas-Missouri Grievance Committee does adjudications which are entitled to the same deference given any other adjudication by a forum created by contract. R591-594, 631-632. *Humphrey v. Moore*, 375 US 335, 336, 338, 345-351 (1964); *General Drivers v. Riss & Co.*, 372 US 517, 517-520 (1963). See also, *Banyard v. Labor Board*, 505 F2d 342, 344-349 (D.C. Cir. 1974); *Steiman v. Spector Freight System, Inc.*, 441 F2d 599, 600-601, 604 fn. 8 (2d Cir. 1971); *Morris v. Werner-Continental, Inc.*, 466 F2d 1185, 1187-1191 (6th Cir. 1972); *Teamsters v. Braswell Motor Freight Lines*, 422 F2d 109, 112-115 (9th Cir. 1970); *Bieski v. Eastern Automobile Forwarding Company*, 396 F2d 32, 42 (3d Cir. 1968).

[52] Wellington, *Labor and the Legal Process*, 163-184 (1968); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 Supreme Court Review 81, 107-126 (1967).

Freight Agreement with its Central States Supplement does not expressly provide for seniority credits for all purposes upon merger of solvent firms.

The Court of Appeals and the District Court ultimately concluded that as a matter of law, Butler and the other Watson-Wilson drivers had a right to be "dovetailed" into the existing Yellow Freight seniority lists for the purpose of bidding runs out of Yellow's terminal at Baxter Springs.[53] They relied upon the language of Sec. 3(a)(1) of Article 5 of the 1964-67 contract.[54] We do not argue that that is a totally unreasonable judicial reading of the contract.[55] But the issue is whether a contrary reading by the Union leadership (prior to adjudication by the Joint Committee in August of 1967) was so arbitrary as to be a breach of the duty of fair representation. A fair reading of the entire text of the contract as it relates to "seniority" indicates that a reasonable Union leadership could conclude that at best Butler and the other transferring Watson-Wilson drivers were entitled to a seniority credit for fringe benefits only.

Sec. 3(a)(1) of Article 5 simply provides that the seniority lists of the two Companies be "dovetailed so as to create a Master Seniority List based upon total years of service with either Company". That provision does not expressly state that all work opportunities and benefits shall be allocated or determined according to original date of hire with either Company. Moreover, other provisions of the contract do provide for allo-

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[53] Appendix A, App. p. A-1; Appendix B, App. p. A-8.

[54] Sec. 3(a)(1) If both carriers involved [in the merger] are solvent, then the seniority lists of the two Companies should be dovetailed so as to create a Master Seniority List based upon total years of service with either Company. This is known as dovetailing in accordance with years of seniority.

[55] We do not contend that broad review of the substantive merits of a Court of Appeals construction of a contract is the proper role of this Court.

cating bid runs on the basis of terminal seniority at the acquiring firm.

As a general rule, the master contract called for determination of seniority rights pursuant to "each of the Supplemental Agreements."[56] As it happens, the Central States Area Over-the-Road contract affirms "terminal seniority, as measured by length of service at such terminal" in the same article which provides that "all runs . . . are subject to seniority."[57]

Referring specifically to mergers of solvent firms, the contract expressly denies a seniority credit for prior work with the acquired firm, when the acquiring firm purchases only operating authority, but not physical assets.[58] Therefore, even though the acquired workers bring work with them, as the Watson-Wilson workers did here, the language of the contract provides that they must line up behind the workers of the acquiring Company when it comes time to bid that work at the terminal of the surviving company.

So, too, if the acquired operating authority is not "parallel" with the operating authority of the acquiring firm, the acquired workers have no contract right to use their prior service credit to to bid on any run in the pool of work which exists after merger. The seniority lists for bidding runs remain separate, each class bidding on its pre-merger increment of work.[59] In this case, the merged operating authorities are not parallel.[60] Yet, But-

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[56] Sec. 1, Article 5 of Appendix D and E, App. pp. A-11, A-18.

[57] Sections 1 and 2 of Article 41, Appendix D and E, App. pp. A-16, A-17, A-24, A-25.

[58] Sec. 3(3) of Article 5 of Appendix D and E, App. pp. A-11, A-19.

[59] Sec. 3(4) and (5) of Article 5 of Appendix D and E, App. pp. A-11, A-12, A-20.

[60] R431-438, 468, 496-497.

ler claims the right to bid on pre-existing Yellow Freight work moving on Yellow's "old" authority.

If workers acquired after merger do not have unqualified contract right (supported by the text of the contract) to use their prior service with the acquired Company to bid on the runs they added to the merged enterprise,[61] they can hardly claim that they reasonably expected to be able to use their prior service to bid on pre-existing runs originating at the terminals of the acquiring Company. No reasonable worker could use the text of the 1964-67, 1967-70 contract to accuse the Local Union of "giving away" firmly secured rights when the local leadership opted for terminal seniority during the Area Committee proceedings.

But did the Change of Operations Committee decision of June 16, 1965 authoritatively construe the contract language for the Union so that its advocacy of terminal seniority for bidding runs was an abandonment of unequivocal rights?

Hardly!

The text of that decision simply calls for a dovetailed master seniority list for "displaced" Watson-Wilson drivers, regardless of their terminal seniority at Watson-Wilson.[62] This list was to determine the order of placement at Yellow Freight, if and when work became available in that enterprise. The document, on its face, is absolutely silent on the material issue: Once the workers got on the Yellow Freight payroll, what additional rights could they claim on the basis of their prior service with Watson-Wilson? Again, the text of the document provides no clues upon which a displaced but transferred Watson-Wilson driver could rely. Accordingly, Local 823 was not closing its eyes to reality when

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[61] Sec. 3(3) of Article 5 of Appendix D and E, App. pp. A-11, A-19.

[62] Appendix C, App. p. A-10.

its leaders urged terminal seniority for bid purposes 26 months later in the adjudication of Butler's claim before the Area Committee.

Nor did the Change of Operation Committee's decision in September of 1966 ("clarifying and elaborating" its decision of June 1965 so as to grant a seniority credit for bidding runs to the 17 Watson-Wilson drivers who successfully bid into Baxter Springs during the first round of bidding)[63] oblige the Local to abandon its advocacy of terminal seniority for bid purposes before the Area Committee in August 1967. By the express terms of the contract, the Area Committee was not bound to apply pre-existing standards to Butler's circumstances. Sec. 3(a)(8) of Article 5 of the 1964-67 Agreement and Sec. 7 of Article 5 of the 1967-70 Agreement gave the Area Committee the power to make "such disposition of seniority problems as in their judgment is appropriate under the circumstances."[64] The Local cannot be deemed to be arbitrarily abandoning "vested" contract rights when it urged terminal seniority for bidding for Butler when the contract allows the adjudication to make an *ad hoc* judgmental disposition of a seniority conflict on the basis that the outcome is "appropriate under the circumstances." The Union simply argued that 24 months after the merger process

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[63] R38-39, 41-46, 58-60, 125-133, 151, 154, 306-316, 326-331, 351-352, 359, 446-448, 469-470, 474-477, 502, 508, 510, 654-655, 691-692, 706, 711-712.

There was a disputed factual issue as to whether in 1966 the Committee decided that although these 17 drivers would be "dovetailed" for bidding runs, all other Watson-Wilson people who thereafter transferred into Baxter Springs would be "dovetailed" for fringes only. In light of the jury verdict, we must assume, as did the District Court, and the Court of Appeals, that the Committee only dealt with the claims of the 17 drivers and did not authoritatively rule on the seniority rights of Watson-Wilson people who might come to work after September 1966.

[64] See Sec. 3(a)(8) of Article 5, Appendix D, App. pp. A-11-14; and Sec. 7 of Article 5, Appendix E, App. p. A-23.

began, it was "appropriate" to respect the desires of a majority of workers at the Baxter Springs terminal.

Given the language and logic of the contract, then, Butler cannot claim that the Union was cavalierly urging the destruction of his reasonable expectations. Therefore, the Union was not acting arbitrarily, especially when advocacy of terminal seniority under the circumstances may well serve the long-run interests of all the workers.

D. The Union as a Majoritarian Political Institution Can Survive Only if It Is Responsive to the Needs of a Majority of Its Constituency

Neither disposition of Butler's claim has *a priori* validity. The workers' problems begin when the employer decides to shift work from one location to another, after merger. That possibility remains whether transferred workers are "endtailed" or "dovetailed" for the purpose of allocating the available work at a given location. A terminal seniority system allows a worker to sink roots into the community outside the work place secure in the knowledge that as long as work is available, his continuing service will give him relatively more predictable opportunities to earn the material base necessary to support his hometown lifestyle. "Outsiders" cannot alter his relative position. The cost of his choice is a relatively greater loss of income if work is shifted to another location and he must not only pull up stakes, but come in on the bottom of the picking order. "Dovetailing" sacrifices the predictability of his relative position at the hometown location for a less drastic decline in income potential should the driver have to follow the work where the employer has placed it. Why shouldn't the outcome in any given case be determined by the aggregate of individual preference schedules, i.e. majority rule?

A Union leadership which does not respect the wishes of the majority will not be long in power. But more importantly,

the entire concept of trade unionism (individuals acting together to achieve common needs against an adversary with greater per capita resources) is rejected by the notion of a minority veto. If a Union cannot act on the desires of the majority, simply because it is the will of the majority, it ceases to be a union as that concept is understood in our legal system. That result is totally inconsistent with the decisional law of this Court.[65]

II. This Case Is An Appropriate Vehicle for Clarifying the Dimensions of Union Behavior Which Are So "Arbitrary" as to Constitute a Breach of the Duty of Fair Representation, Regardless of the Motivation Underlying That Behavior.

In most general terms, this Court has held that a Union breaches the duty of fair representation if it disposes of a members claimed breach of the contract in an "arbitrary" fashion *or* in "bad faith"—the latter concept referring to particular kinds of motivation underlying the conduct—racial, sexual, or internal union political bias.[66] (emphasis supplied)

Two quite distinct concepts are suggested. In one case, liability turns solely on proof of subjective motivation: Was the

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[65] *Emporium Capwell Co. v. Community Organization*, 420 US 50, 62-66, 70 (1975); *Labor Board v. Allis-Chalmers*, 388 US 175, 180-181 (1967); *Humphrey v. Moore*, 375 US 335, 346-350 (1964); *Ford Motor Co. v. Huffman*, 345 US 330, 337-339 (1953). Of course, the majoritarian principle is not absolute. Blacks, Chicanos, women, and political dissents cannot be disadvantaged simply because a majority of the Union doesn't want to treat with them. *Emporium Capwell v. Community Organization*, 420 US 50, 64-65 (1975). But subjective bad faith exclusion on racial, sexual, or internal political criteria is not at issue here.

[66] *Emporium Capwell Co. v. Community Organization*, 420 US 50, 64-65 (1975); *Motor Coach Employees v. Lockridge*, 403 US 274, 299, 301 (1971); *Vaca v. Sipes*, 386 US 171, 191-194 (1967).

member treated as s(he) was because the leadership (or the majority) didn't like blacks, women, internal political dissidence, or just the cut of the members jib? The frame of reference is broadly "factual".

On the other hand, to argue that some conduct is "arbitrary" or irrational is often to introduce a normative element into the analysis. The argument becomes a matter of ends or values which the Union "ought to" pursue, regardless of its motivation for doing or not doing so. To say that a person (or institution) is behaving irrationally or arbitrarily is often to say they are pursuing the wrong goals. The question then is, what goals does the labor law system reinforce, and thus, impose on trade unions. That is not a factual inquiry in the usual sense of the terms.

Obviously, outcomes will be determined by the frame of reference which guides analysis. Here, the Union did not act in "bad faith" in the usual subjective sense. No one was out to get Butler because of his race, sex, politics, or lifestyle. But the Court of Appeals thought that the Union leadership was obliged to read the contract as it did and it could not do otherwise simply because of angry pressures from the majority of the membership. In assessing the result, this Court must indicate what affirmative normative obligations a Union must discharge toward its members and the manner in which they must discharge them. That question (which is crucial to all disputes in which the Union has not been acting out of personal prejudice) has not yet been answered.[67] Since the entire duty of fair representation cause of action will be profoundly affected by a determination that the Union does or does not have affirmative obligations of a particular character, prompt answer should

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[67] Lewis, *Fair Representation in Grievance Administration*, 1967 Supreme Court Review, 107-109 (1967).

be forthcoming, particularly since the cause of action is largely a judicial creation.[68]

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[68] *Motor Coach Employees v. Lockridge*, 403 US 274, 286, 289-290 (1971); *Vaca v. Sipes*, 386 US 171, 177-189 (1967). Recently, the Labor Board has held that unions have affirmative obligations beyond avoidance of subjective prejudice, which must be satisfied if they are not to violate the duty of fair representation created by Sec. 8(b)(1)(A) of the Act. However, the Board carefully avoided any coherent elaboration of those obligations. Nonetheless, it claimed that it was simply adopting a doctrine which had been judicially created and elaborated. Given the scope of Board jurisdiction, judicial clarification cannot come too soon. *Rhodes & Jamieson, Ltd.*, 217 NLRB No. 95 (1975).

CONCLUSION

The concept of the Union as a political mechanism which enables workers to relate to one another and thereby increase their individual strength by acting in aggregate is totally undermined by a ruling that as a matter of law a Union cannot advocate a position before an adjudicative tribunal commissioned to resolve contract disputes which position is determined solely by the strength of majority desires in circumstances where the Union's stance did not constitute an abandonment of minority rights firmly secured by the language and logic of the contract, and would not lead to a diminution of net benefits for the entire membership considered in aggregate. Therefore, the decision of the Court of Appeals is contrary to the fundamental decisional law of this Court. The matter is ripe for review because of the need for clarification of a Union's affirmative obligations to its membership when processing claims of breach of the labor contract, beyond the avoidance of simple bad faith, racial, sexual, or internal political bias.

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APPENDIX

APPENDIX A

II. The Instructions on the Legal Effect of the Contract

The collective bargaining agreement in effect during the merger process in 1965 and 1966 provided in Article V § 3(a) that, in the event of merger, the seniority of affected employees was to be determined by "mutual agreement" between the employers and the union, in accordance with the following general rules:

> "§ 3(a)(1) If both carriers involved are solvent then the seniority lists of the two Companies should be dovetailed so as to create a Master Seniority List based upon total years of service with either Company. This is known as dovetailing in accordance with years of seniority.
>
> * * * * * * *
>
> "§ 3(a)(8) The parties acknowledge that specific situations may arise which may not be covered by the above rules, or in which the parties may feel that different treatment of the problem is necessary.
>
> * * * The Change of Operations Committee * * * shall have the authority to add to or modify these rules in specific situations presented to it."

When the Change of Operations Committee was first presented the facts regarding the proposed merger, it issued a written ruling on June 16, 1965 consistent with the contract:

> "* * * All displaced employees * * * shall be placed on the Master Seniority [List] with the original date of hire, regardless of the terminals they may have worked in where they had accumulated only terminal seniority * * *."

By September of 1966, approximately seventeen former Watson-Wilson employees, not including Butler,[13] were working at the Baxter Springs terminal of Yellow, but their names had not yet been dovetailed with those of the Yellow drivers at that terminal.[14]

On September 20, 1966, another Change of Operations Committee meeting was held in Chicago. No minutes of that meeting were produced and, unlike the June 16, 1965 meeting, it did not result in the issuance of a written decision. The evidence as to what took place at that meeting was slight, and dealt only with its purported outcome. Mr. Melton, then a Vice President for Watson-Wilson, testified that:

> "* * * the decision was that all those employees presently working at St. Louis, Chicago, and Baxter Springs would be dovetailed in line with their full company seniority and any employees accepting job opportunity after that date would go to the bottom of the list for terminal seniority and [would have] company seniority for his [sic] fringe benefits."

The Local had apparently not reached the same conclusion as to the outcome of that meeting, for on September 26, 1966, Local representative Kitts posted a roster in which only the first

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[13] It is not contended that Butler was entitled to recall to the Baxter Springs terminal at that time.

[14] The defendants urge that separate seniority lists were required by the contract because the companies were operating under non-parallel rights and the ICC had not yet finally approved the merger. They contend that the instructions erroneously fixed the date of final ICC approval and hence erroneously fixed the date on which dovetailing was required. The court disagreed, ruling that dovetailing was required under the contract long before the ICC finally approved the merger on October 10, 1968. We do not believe that the issue of *when* the rosters were to be consolidated is relevant to the issue of *which* employees were to be granted company seniority. Hence, any mistake as to the date of final ICC approval is not relevant.

nine of the seventeen former Watson-Wilson drivers already working at Baxter Springs were dovetailed with the Yellow drivers. The remaining eight were given terminal seniority for bid purposes. Several of the latter employees filed grievances, and the union and Employer subsequently agreed to grant them company seniority.[15] The result was a roster on December 16, 1966, which dovetailed all the former Watson-Wilson employees *then* working for Yellow at Baxter Spring with the Yellow drivers.

The court instructed the jury in effect that, when recalled to work at Baxter Springs on March 29, 1967, Butler was entitled to be granted his company seniority by the provisions of the collective bargaining agreement and the relevant Change of Operations decision, and that Yellow breached the contract if it did not afford him such seniority. The appellants object to this instruction claiming that it removed the only significant issue from the jury—whether it made any difference that Butler came to Baxter Springs after the purported September 1966 cut-off date.

We find no error in the court's legal conclusion that the contract was unambiguous. Article V § 3(a)(1) directly covers the situation which arose when Butler was called to work. Yellow claims that Article V § 6 authorizes less than full seniority, but that provision deals only with instances where a branch or ter-

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[15] The record is murky as to how this change came about. Local representative Kitts testified that Mr. Roy Williams, Chairman of the union bloc on the Grievance Committee, informed him that he had been mistaken in his interpretation of the Committee's September 20 decision, and that all currently working employees were to be dovetailed. Mr. Smith, who was one of the former Watson-Wilson employees originally denied company seniority by the September 26 roster who filed a grievance, testified that:

> "* * * Brother Williams got up and said it was sort of fouled up and they would have to go back to Chicago to the original Change of Operations Committee, at least that's what I understood him to say."

minal of the company is closed, and was plainly not applicable to the merger here. Since the contract was not ambiguous,[16] it was proper for the court to instruct the jury as to its meaning and effect. See, *Motor Carriers Council of St. Louis, Inc. v. Local Union No. 600,* 468 F2d 650, 653 (8th Cir. 1973).

Yellow claims, however, that the September 20, 1966, "decision" of the Change of Operations Committee altered the terms of the contract, and that the instructions were defective in failing to even mention this decision. We do not agree. The trial court's reasoning in removing the issue of contract-alteration from the jury is not expressed on the record. It seems clear, however, that the purported contract alteration was ignored for one of two reasons: (1) there was not sufficient evidence to permit a finding that the contract had indeed been altered; or (2) there was not sufficient evidence to permit a finding that the Committee had complied with the conditions of § 3(a)(3) in modifying the contract.[17] We conclude that failure to instruct on the September 20 decision was proper under either theory.

First, the defendants' proof of the decision was entirely dependent on the oral testimony of two witnesses—Mr. Kitts and Mr. Melton. Within days of the purported decision, Mr. Kitts took part in the posting of a roster which was inconsistent with the defendants' version of what that decision had held. We need not determine the degree of formality which is necessary for the Committee to modify the contract, but surely a written

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[16] For the same reason, there was no abuse of discretion in the court's exclusion of oral testimony offered to show industry practices in other mergers and offered to explain other Change of Operations Committee decisions which were allegedly analogous.

[17] While we are not faced with the issue, it seems clear that there is a third theory protecting employees in the contract-modification process. For, even without the conditional language of § 3(a)(8), under the fair representation doctrine it seems clear that the Committee could not modify the contract in an irrational way in order to discriminate against an employee or group of employees.

record of some type is necessary—whether a formal written decision, as employed in June of 1965, an exchange of correspondence, or the minutes of the meeting. Only when the decision is reduced to some permanent form will affected persons be adequately informed of the modification. Assuming that the District Court was relying on this approach, we agree that the testimony of Kitts and Melton was insufficient, as a matter of law, to support a finding that the contract had been modified.

Second, we read § 3(a)(8) to limit the Committee's power to those specific situations which are not covered by the rules, or in which "the parties may feel that different treatment of the problem is necessary." Since the rules clearly covered Butler's recall, the power to alter the contract could only be triggered by the latter condition; the cutoff line between employees recalled by September 1966 and employees recalled thereafter had to be rooted in necessity. The defendants made no showing that it was necessary to treat Butler in a different manner than his predecessors; indeed, they did not even attempt to demonstrate that the Committee *felt* that different treatment was necessary. Not only was there no showing of necessity, but the record is devoid of any rational explanation for the cutoff imposed here and counsel for the appellants was unable to advance any explanation at oral argument. Under these circumstances, the District Court would have been correct in holding that the September 20, 1966 action of the Committee was not in accordance with the contract. Hence, the explicit provisions of Article V § 3(a)(1), as implemented by the earlier Change of Operations decision, were controlling. The instructions adequately apprised the jury of the meaning of the contract.

III. Propriety of the Instructions and Sufficiency of the Evidence on the Issue of Fair Representation

The appellants assert that the court's instructions on the issue of unfair representation were inadequate. We have exam-

ined them carefully and find that there was no error. The court instructed the jury that the Local had "a legal duty fairly to represent the plaintiff without arbitrariness, discrimination, or bad faith * * * in the processing of his complaint and grievance", and that the jury could not find the Local liable unless it found that the Local had breached that duty. In giving these instructions, the court employed the language of the Supreme Court in *Vaca v. Sipes, supra,* at 190. We cannot agree with the appellants that, in the circumstances of this case, further definitions of "arbitrary", "discriminatory", or "bad faith" were required. Furthermore, the court correctly stressed to the jury that it could not find Yellow liable unless it first found that the Local had failed to represent the plaintiff fairly.

The evidence viewed most favorably to the jury verdict on the issue of fair representation supports it. Kitts testified to an atmosphere of antagonism among Yellow drivers after the first Change of Operations Committee decision in 1965:

> "* * * I had quite a lot of trouble with the Yellow Freight drivers * * *. Everybody knew that Watson drivers had a lot of seniority, Watson was an old line * * * and they didn't want any of them down there. * * * [T]hey felt that they had no reason to be there * * *. And there was a lot of dissatisfaction amongst the drivers, and well, it got pretty bad. They was about ready to throw me out of the hall, and the president of our local, too, because they absolutely didn't want to lose any of their work. * * *"

The jury could logically infer that this hostility against Watson-Wilson employees was given an outlet in the Local's aborted attempt in the September 26, 1966 roster to cut off eight of those former employees who were already working at the Baxter Springs terminal. Butler testified that Local President Webb "guaranteed" that his grievance would be rejected, and told him flatly that he could not attend the Grievance Committee hearing. There was adequate evidence from which the jury

could find that the Local was continuing to protect Yellow drivers—this time at the expense of Butler—and that the Change of operations Committee alleged decision of September 1966 was an irrational and discriminatory one which the Local failed to contest on Butler's behalf because it did not wish to antagonize Yellow drivers.[18] In short, the jury could find that the Local had breached its duty to insist that the Employer adhere to the contract, and had acquiesced in an irrational interpretation of the contract, thereby discriminating against Butler.

We stress, however, that we do not hold here that the mere fact that a District Court ultimately disagrees with a union's interpretation of a collective bargaining agreement is sufficient in and of itself to establish a case of unfair representation.

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[18] To be sure, Kitts testified that he presented the grievance to the Committee and asked that it be accepted, and Melton testified to the same effect. Whether Kitts made a "strong and complete" presentation at the hearing as the appellants suggest in their brief was a factual issue resolved against them by the jury. The jury may have discounted the testimony of Kitts and Melton due to their demeanor, the Local's past favoritism to Yellow drivers, and Butler's testimony.

APPENDIX B

A hearing on defendants' post-trial motions, including the present motions for judgment notwithstanding the verdict and for a new trial, was held on August 21, 1973. Other post-trial proceedings and additional briefs have ensued since the argument with respect to the original post-trial motions. The last letter brief was received March 22, 1974, accompanied by a relevant decision of the United States District Court for the District of Kansas in Dudley v. Woods Industries, Inc., et al., Civil Action No. KC-3491 (D. Kans., March 20, 1974).

With insignificant exceptions and variations, defendants' numerous contentions in support of the motions for judgment notwithstanding the verdict and for a new trial may be summarized into the following general contentions: (1) that the Court erred in not permitting certain testimony as to the meaning of the collective bargaining agreement and the Change of Operations Committee decisions; (2) that plaintiff's action is barred by the statute of limitations; (3) that the Court erred in its instructions to the jury as to interpretation of the contract; (4) that the Court erred in allowing plaintiff to amend his complaint and that the granting of declaratory and compensatory relief was in error; and (5) that the Court erred in submitting the issue of exemplary or punitive damages to the jury.

Defendants initially contend that witnesses Karsten, Kitts, Pickens, Melton and Bath should have been allowed to testify as to the meaning and effect of the applicable sections of the collective bargaining agreement and the Change of Operations decisions. In support thereof, defendants assert that ". . . the courts have consistently allowed oral testimony from the parties to a collective bargaining contract as to their understanding of the terms, provisions and procedures under the agreement, as well as to various oral agreements made thereunder." In support of that statement defendants cite the single case of Watson

v. International Brotherhood of Teamsters, 399 F2d 875 (5th Cir. 1968). The *Watson* case is factually distinguishable to the case at bar. That case involved a preexisting oral agreement between the parties which was not abrogated by the subsequent nonintegrated written agreement. The written instrument even contained a provision which provided that such previous agreements be continued.

[1, 2] The issue whether a contract is ambiguous or otherwise subject to extrinsic interpretation is a matter of law for initial resolution by the trial court. Motor Carriers Council of St. Louis, Inc. v. Local Union No. 600, 486 F2d 650 (8th Cir. 1973); Metropolitan Paving Co. v. City of Aurora, 449 F2d 177, 181 (10th Cir. 1971); Pipkin v. FMC Corp., 427 F2d 353, 356 (5th Cir. 1970); Steele v. McCargo, 260 F2d 753, 758 (8th Cir. 1958). The contract in the case at bar in its material terms, when considered as a whole, was not ambiguous, and did not otherwise require the testimony of the lay witnesses to determine the interpretation and construction of terms contained therein. *Cf.*, Motor Carriers Council of St. Louis, Inc. v. Local Union No. 600, 486 F2d 650, 653 (8th Cir. 1973). Section 3 of Article 5 clearly delineated the agreement of the parties, expressly describing what was to be done in the precise circumstances of this case. That agreement was correctly applied by the Change of Operations Committee in its decision of June 16, 1965. In a case of this type, neither Mr. Kitts nor any other individual could properly have been permitted to testify to any practice, intent or subsequent action contrary to the terms of the basic agreement. Further, any proffered evidence, even if otherwise admissible, would not have been competent to divest this plaintiff of those seniority rights guaranteed him by the written collective bargaining agreement. The proffered testimony was conclusory, argumentative, and otherwise inadmissible.

APPENDIX C

June 16, 1965—1:15 o'clock

Case No. 155 . . . Case No. 155 is as follows:

Watson-Wilson Transportation

Re: Request for change of operation involving:

Local 961, Denver	Local 147, Des Moines
554, Omaha	710, Chicago
608, Lincoln	600, St. Louis
120, St. Paul	41, Kansas City
383, Sioux City	823, Joplin
577, Amarillo	371, Rock Island

Local 784, Grand Island

Mr. Hoffa: Change of operations of Watson-Wilson to be agreed to as presented, with the following understandings:

1. All displaced employees in Central States Conference and Southern Conference shall be placed on a master seniority with the original date of hire, regardless of the terminals they may have worked in where they had accumulated only terminal seniority, with the understanding that the Denver drivers who had westbound seniority as well as eastbound seniority shall be governed by past practice.

2. Company agrees there will be no additional change of operation that requires a change of domicile for a period of three years.

3. Company further agrees that in lieu of the two-year layoff period existing in the Western, Central and Southern contracts, it shall be extended to five years.

APPENDIX D

National Master Freight Agreement and Central States Area Over-the-Road

Supplemental Agreement for the Period of
February 1, 1964 to March 31, 1967

Article 5.

Section 1. *Seniority Rights*

Seniority rights for employees shall prevail under this Agreement and all agreements supplemental hereto. Seniority shall only be broken by discharge, voluntary quit, more than a two (2) year layoff or as provided in any applicable provisions of the Supplemental Agreements. The extent to which seniority shall be applied as well as the methods and procedures of such application shall be clearly set forth in each of the Supplemental Agreements.

Section 3. (a) In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved.
In the application of this provision the following general rules shall apply:

Merger, purchase, acquisition, sale, etc.

4. Company further agrees to pay a minimum of 30 days room rent to give drivers the opportunity of disposing of their homes for as little loss as possible in re-sale of such homes.

5. Company further agrees that all displaced personnel that are not covered by the master agreement shall be offered positions at other terminals where new employees are required and, if such old employees are rehired, they shall have fringe benefit seniority only.

(1) If both carriers involved are solvent then the seniority lists of the two Companies should be dovetailed so as to create a Master Seniority List based upon total years of service with either Company. This is known as dovetailing in accordance with years of seniority. In the application of this rule it is immaterial whether the transaction is called a merger, purchase, acquisition, sale, etc. It is also immaterial whether the transaction involves merely the purchase of stock of one corporation by another, with two separate corporations continuing in existence, and it is immaterial whether separate terminals of the Companies are physically merged or not, subject, however to rules 4 and 5 below.

(2) If, in the type of transaction described above, one of the Companies is insolvent at the time of the transaction, then the employees of the insolvent Company will go to the bottom of the master seniority list. The test of whether a Company is solvent or insolvent is governed entirely by whether bankruptcy, receivership, composition for the benefit of creditors, reorganization, or similar proceedings are pending in the state or federal court. If such proceedings are pending, the Company is considered insolvent for the purpose of this rule.

(3) If the transaction involved constitutes merely a purchase of permits or rights by one Carrier from another Carrier, without the purchase or acquisition of equipment, terminals, or business, the employees of the Company selling the permits shall have no seniority rights at all, but shall be offered opportunity for employment at the bottom of the seniority list of the Company purchasing the permits. If such employees are hired they shall be given seniority credit for fringe benefits only.

(4) If the merger, purchase, acquisition, sale, etc. involves two Companies which do not have parallel operating rights then separate seniority lists will be maintained for the separate non-parallel operations. However, there will be one master seniority list for the purpose of fringe benefits, etc., and for the protection of employees laid off on one seniority board when work opportunities are available on the other seniority board and all eligible employees on such other seniority board are employed.

(5) Where the transaction involves both parallel and non-parallel rights then rules 1 and 2 above will apply to the parallel rights, and rule 4 will apply to non-parallel rights.

(6) Where only temporary authority is granted in connection with any of the transactions described above, then separate seniority lists shall continue in effect until final authority is granted unless otherwise agreed. The Company which is to survive will assume the obligations of both collective bargaining agreements during the period of the temporary authority.

(7) If in connection with the transactions described in these rules the successor Company determines to discontinue the use of a Local Cartage Company, the employees of that Local Cartage Company, who have worked on the pick-up and delivery service which is retained by the successor Company shall be given opportunity to continue to perform such service as an employee of such successor Company, and shall have their seniority dovetailed as described in the above rules.

(8) The parties acknowledge that specific situations may arise which may not be covered by the above rules, or in which the parties may feel that different treatment of the problem is necessary. In such situation the Employer, the Unions involved, and the Area Committee may mutually agree to such disposition of the seniority problems, as in their judgment is appropriate under the circumstances. The Change of Operations Commit-

tee under the Local Supplement or the National Master Agreement shall have the authority to add to or to modify these rules in specific situations presented to it.

Section 6. *New Branches, etc.*

(a) Opening of new branches, terminals, divisions of operations.

(1) When a new branch, terminal, division or operation is opened (except as a replacement for existing operations or as a new division in a locality where there are existing operations), the Employer shall offer the opportunity to transfer to regular positions in the new branch, terminal, division or operation in the order of their company or classification seniority, to employees in those branches, terminals, divisions or operations which are affected in whole or part by the opening of the new branch, terminal, division or operation. This provision is not intended to cover situations where there is replacement of an existing operation or where a new division is opened in a locality where there is an existing terminal. In these latter situations, laid-off or extra employees in the existing facilities shall have first opportunity for employment at the new operation in accordance with their seniority. If all regular full-time positions are not filled in this manner, then the provisions of the above paragraph shall apply.

(2) The transferred employees, other than those referred to in the exception to Section 6(a)(1), above shall, for a period of 30 days following the transfer, have an unqualified right to return to their old branch, terminal, division or operation if it is still in existence and carry with them their seniority at that old branch, terminal, division or operation. Employees who avail themselves of the transfer privileges because they are on lay-off at their original terminal may exercise their seniority rights if work becomes available at the original terminal dur-

ing the two year lay-off period allowed them at their original terminal.

Transferred employees shall have, after 30 days, the same privileges with respect to subsequent transfers as set forth in paragraph 1 above.

Closing of Branches, etc.

(b) Closing of branches, terminals, divisions of operations.

(1) When a branch, terminal, division or operation is closed and the work of the branch, terminal, division or operation is eliminated, an employee who was formerly employed at another branch, terminal, division or operation shall have the right to transfer back to such former branch, terminal, division or operation and exercise his seniority based on the date of hire at the branch, terminal, division or operation into which he is transferring provided he has not been away from such original terminal for more than two years.

(2) When a branch, terminal, division or operation is closed or partially closed and the work of the branch, terminal, division or operation is transferred to another branch, terminal, division or operation in whole or in part, an employee at the closed or partially closed down branch, terminal, division or operation shall have the right to transfer to the branch, terminal, division or operation into which the work was transferred if regular work is there available. Such employee, however, shall go to the bottom of the seniority board and shall have the right of job selection only in accordance with his seniority at such terminal. However, he shall exercise his company seniority for lay-off purposes and all other contract benefits.

(c) When a branch, terminal, division or operation is closed and the work of the branch, terminal, division or operation is eliminated, and no part of it is transferred to another branch,

terminal, division or operation employees who are affected thereby shall be given first opportunity for available regular employment at any other branch, terminal, division or operation of the Employer within the Area of the Supplemental Agreement under which employed. The obligation to offer such employment shall continue for a period of two years from the date of closing, however the Employer shall not be required to make more than one offer during this period. Any employee accepting such offer shall pay his own moving expenses. If hired, they shall go to the bottom of the seniority board but shall have company seniority for fringe benefits only.

Article 41.

Section 1. *Seniority*

Seniority rights for employees shall prevail. Seniority shall be broken only by discharge, voluntary quit, or more than a two-year lay-off. In the event of a lay-off, an employee so laid off shall be given two weeks' notice of recall mailed to his last known address. In the event the employee fails to make himself available for work at the end of said two weeks, he shall lose all seniority rights under this Agreement. A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Stewards shall be granted super-seniority for all purposes, including lay-off, rehire, bidding and job preference, if requested by the Local Union within sixty (60) days after the effective date of this Agreement; but only one (1) steward shall have super-seniority for such purposes. Any controversy over the seniority standing of any employee on the seniority list shall be submitted to the joint grievance procedure.

Terminal seniority, as measured by length of service at such terminal shall prevail excepting in those instances where the Employer, the Unions involved, and the Central States Drivers Counsel agree to the contrary.

The Local Union and the Employer shall agree, subject to the approval of the Joint Area Committee, on circumstances under which persons who leave the classification of work covered by this Agreement, but remain in the employ of the Employer in some other capacity, may retain seniority rights upon their return to their original unit. In the absence of such express agreement, such employee shall lose all seniority rights upon leaving.

Section 2.

(a) All runs and new positions are subject to seniority and shall be posted for bids. Posting shall be at a conspicuous place so that all eligible employees will receive notice of the vacancy, run or position open for bid, and such posting of bids shall be made not more than once each calendar year, unless mutually agreed upon. Peddle runs shall be subject to bidding provided driver is qualified.

(b) When it becomes necessary to reduce the working force, the last man hired shall be laid off first, and when the force is again increased, the men are to be returned to work in reverse order in which they are laid off.

APPENDIX E

National Master Freight Agreement

and

Central States Area Over-the-Road

Supplemental Agreement
For the Period of
April 1, 1967
Through
March 31, 1970

Article 5.

Section 1. *Seniority Rights*

Seniority rights for employees shall prevail under this Agreement and all Agreements supplemental hereto. Seniority shall only be broken by discharge, voluntary quit, more than a three (3) year lay-off, or for such greater period than three (3) years as a change of operation committee may direct during the third year as provided in Article 8(e) herein, or as provided in any applicable provisions of the Supplemental Agreements.

The extent to which seniority shall be applied as well as the methods and procedures of such application shall be clearly set forth in each of the Supplemental Agreements.

Section 3. (a) In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved.

In the application of this provision the following general rules shall apply:

Merger, purchase, acquisition, sale, etc.

(1) If both carriers involved are solvent then the seniority lists of the two Companies should be dovetailed so as to create a Master Seniority List based upon total years of service with either Company. This is known as dovetailing in accordance with years of seniority. In the application of this rule it is immaterial whether the transaction is called a merger, purchase, acquisition, sale, etc. It is also immaterial whether the transaction involves merely the purchase of stock of one corporation by another, with two separate corporations continuing in existence, and it is immaterial whether separate terminals of the Companies are physically merged or not, subject, however, to rules 4 and 5 below.

(2) If, in the type of transaction described above, one of the Companies is insolvent at the time of the transaction, then the employees of the insolvent Company will go to the bottom of the master seniority list. The test of whether a Company is solvent or insolvent is governed entirely by whether bankruptcy, receivership, composition for the benefit of creditors, reorganization, or similar proceedings are pending in the state or federal court. If such proceedings are pending, the Company is considered insolvent for the purpose of this rule.

(3) If the transaction involved constitutes merely a purchase of permits or rights by one Carrier from another Carrier, without the purchase or acquisition of equipment, terminals, or business, the employees of the Company selling the permits shall have no seniority rights at all, but shall be offered opportunity for employment at the bottom of the seniority list of the Company purchasing the permits. If such employees are hired they shall be given seniority credit for fringe benefits only.

(4) If the merger, purchase, acquisition, sale, etc. involves two Companies which do not have parallel operating rights then separate seniority lists will be maintained for the separate non-parallel operations. However, there will be one master seniority list for the purpose of fringe benefits, etc., and for the protection of employees laid off on one seniority board when work opportunities are available on the other seniority board and all eligible employees on such other seniority board are employed.

(5) Where the transaction involves both parallel and non-parallel rights then rules 1 and 2 above will apply to the parailel rights, and rule 4 will apply to non-parallel rights.

(6) Where only temporary authority is granted in connection with any of the transactions described above, then separate seniority lists shall continue in effect until final authority is granted unless otherwise agreed. The Company which is to survive will assume the obligations of both collective bargaining agreements during the period of the temporary authority.

(7) If in connection with the transactions described in these rules the successor Company determines to discontinue the use of a Local Cartage Company, the employees of that Local Cartage Company, who have worked on the pick-up and delivery service which is retained by the successor Company shall be given opportunity to continue to perform such service as an employee of such successor Company, and shall have their seniority dovetailed as described in the above rules.

(8) Area and/or State Committees created pursuant to Local Supplements which have previously established rules of seniority, not contrary to the provisions of such Supplements, and approved by the Joint Area Committee, may continue to apply such rules if such rules are reduced to writing.

(b) If the minimum wage, hour and working conditions in the company absorbed differ from those minimums set forth in this Agreement and Supplements thereto, the higher of the two shall remain in effect for the men so absorbed.

(c) Where any employee is required, through no fault of his own, to change residence in order to follow employment as a result of an approved change of operation, the Employer shall move the employee and assume the responsibility for proven loss of, or damage to, household goods due to such move, or pay his moving expenses, including insurance against loss or damage. This shall not apply to moves within the 75-mile radius as defined in the peddle run provision, except where by past practice and agreement, a greater or lesser radius has been agreed to. The Employer shall not be responsible for moving expenses if the employee changes his residence as a result of voluntary transfer.

Section 5. *New Branches, etc.*

(a) Opening of new branches, terminals, divisions or operations.

(1) When a new branch, terminal, division or operation is opened (except as a replacement for existing operations or as a new division in a locality where there are existing operations), the Employer shall offer the opportunity to transfer to regular positions in the new branch, terminal, division or operation in the order of their company or classification seniority, to employees in those branches, terminals, division or operations which are affected in whole or part by the opening of the new branch, terminal, division or operation. This provision is not intended to cover situations where there is replacement of an existing operation or where a new division is opened in a locality where there is an existing terminal. In these latter situations, laid-off or extra employees in the existing facilities shall have first opportunity for employment at the new operation in accordance with their seniority. If all regular full-time positions are not filled in this manner, then the provisions of the above paragraph shall apply.

(2) The transferred employees, other than those referred to in the exception to Section 5(a)(1), above shall, for a period of 30 days following the transfer, have an unqualified right to return to their old branch, terminal, division or operation if it is still in existence and carry with them their seniority at that old branch, terminal, division or operation. Employees who avail themselves of the transfer privileges because they are on lay-off at their original terminal may exercise their seniority rights if work becomes available at the original terminal during the two year lay-off period allowed them at their original terminal.

Transferred employees shall have, after 30 days, the same privileges with respect to subsequent transfers as set forth in Paragraph 1 above.

Closing of Branches, etc.

(b) Closing of branches, terminals, divisions or operations.

(1) When a branch, terminal, division or operation is closed and the work of the branch, terminal, division or operation is eliminated, an employee who was formerly employed at another branch, terminal, division or operation shall have the right to transfer back to such former branch, terminal, division or operation and exercise his seniority based on the date of hire at the branch, terminal, division or operation into which he is transferring provided he has not been away from such original terminal for more than two years.

(2) When a branch, terminal, division or operation is closed or partially closed and the work of the branch, terminal, division or operation is transferred to another branch, terminal, division or operation in whole or in part, an employee at the closed or partially closed down branch, terminal, division or operation

shall have the right to transfer to the branch, terminal, division or operation into which the work was transferred if regular work is there available. Such employee, however, shall go to the bottom of the seniority board and shall have the right of job selection only in accordance with his seniority at such terminal. However, he shall exercise his company seniority for lay-off purposes and all other contract benefits.

(c) When a branch, terminal, division or operation is closed and the work of the branch, terminal, division or operation is eliminated, and no part of it is transferred to another branch, terminal, division or operation employees who are affected thereby shall be given first opportunity for available regular employment at any other branch, terminal, division or operation of the Employer within the Area of the Supplemental Agreement under which employed. The obligation to offer such employment shall continue for a period of three years from the date of closing, however the Employer shall not be required to make more than one offer during this period. Any employee accepting such offer shall pay his own moving expenses. If hired, they shall go to the bottom of the seniority board but shall have company seniority for fringe benefits only.

Section 7

The parties acknowledge that specific situations may arise which may not be covered by the rules set forth in this Article or in which the parties may feel that different treatment of the problem is necessary. In such situation, the Employer, the Unions involved, and the Area Multi-Conference or National Committees may mutually agree to such disposition of the seniority problems as in their judgment is appropriate under the circumstances. The Change of Operations Committee under the Local Supplements of the National Master Agreement shall have the authority to add to or to modify these rules in specific situations presented to them.

Article 41.

Section 1. *Seniority*

Seniority rights for employees shall prevail. Seniority shall be broken only by discharge, voluntary, quit, or more than a three-year lay-off, or for such greater period than three (3) years as a Change of Operations Committee may direct during the third year of a change of operations as provided in Article 8(e) herein. In the event of a lay-off, an employee so laid off shall be given two weeks' notice of recall mailed to his last known address. In the event the employee fails to make himself available for work at the end of said two weeks, he shall lose all seniority rights under this Agreement. A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Stewards shall be granted super-seniority for all purposes, including lay-off, rehire, bidding and job preference, if requested by the Local Union within sixty (60) days after the effective date of this Agreement; but only one (1) steward shall have super-seniority for such purposes. Any controversy over the seniority standing of any employee on the seniority list shall be submitted to the joint grievance procedure.

Terminal seniority, as measured by length of service at such terminal shall prevail excepting in those instances where the Employer, the Unions involved, and the Central States Drivers Council agree to the contrary.

The Local Union and the Employer shall agree, subject to the approval of the Joint Area Committee, on circumstances under which persons who leave the classification of work covered by this Agreement, but remain in the employ of the Employer in some other capacity, may retain seniority rights upon their return to their original unit. In the absence of such express agreement, such employee shall lose all seniority rights upon leaving.

Section 2

(a) All runs and new positions are subject to seniority and shall be posted for bids. Posting shall be at a conspicuous place so that all eligible employees will receive notice of the vacancy, run or position open for bid, and such posting of bids shall be made not more than once each calendar year, unless mutually agreed upon. Peddle runs shall be subject to bidding provided driver is qualified.

(b) When it becomes necessary to reduce the working force, the last man hired shall be laid off first, and when the force is again increased, the men are to be returned to work in reverse order in which they are laid off.

APPENDIX F

WATSON WILSON TRANSPORTATION SYSTEM, INC.
General Offices: 1910 Harney Street
Omaha 2, Nebraska

Certified Mail
Return Receipt Requested

June 30, 1965

Mr. Billy Butler
5033 Greybull Ave.
Cheyenne, Wyo.

Dear Sir:

Company relay driving jobs are available at Chicago, Illinois, Rock Island, Illinois, Des Moines, Iowa, Baxter Springs, Kansas, Liberal, Kansas, Goodland, Kansas, Kearney, Nebraska and St. Louis, Missouri.

This is your notice of the availability of such jobs and awards will be made with due regard with the master seniority list. If you wish to be considered for the above jobs, check your choices and return to me, Harold Melton, Omaha General.

1. I am available and wish to be considered for these jobs and my 1st choice, 2nd choice, 3rd choice, 4th choice, 5th choice, 6th choice, 7th choice and 8th choice are as follows:

Chicago, Illinois	☐	Liberal, Kansas	☐
Rock Island, Illinois	☐	Goodland, Kansas	☐
Des Moines, Iowa	☐	Kearney, Nebraska	☐
Baxter Springs, Kansas	☐	St. Louis, Missouri	☐

2. I do not desire to be considered for any of the above jobs. ☒

3. Drivers not desiring to be considered for a position or successful in holding a position will be placed on the master layoff list from which additional positions will be filled.

We would like the return of this letter within 7 days if at all possible.

CLERK U.S. DISTRICT COURT

Exhibits:

P 12 D Y 9

Case No. 20374-4

Yours very truly

/s/ Harold Melton
Harold E. Melton
V.P.—Industrial Relations

cc: Local Union

P.S. A self-addressed envelope is enclosed for your convenience.

APPENDIX G

WATSON WILSON TRANSPORTATION SYSTEM, INC.
General Offices: 1910 Harney Street
Omaha 2, Nebraska

Certified Mail
Return Receipt Requested

August 5, 1965

Mr. Billy Butler
5033 Greybull Ave.
Cheyenne, Wyoming

Dear Sir:

Company relay driving jobs are available at Baxter Springs, Kansas and Liberal, Kansas.

This is your notice of the availability of such jobs and awards will be made with due regard with the master seniority list. If you wish to be considered for the above jobs, check your 1st and 2nd choices and return to me, Harold Melton, Omaha General.

(1) I am available and wish to be considered for work at Baxter Springs, Kansas. ☒

(2) I am available and wish to be considered for work at Liberal, Kansas. ☒

(3) I do not desire to be considered for the above jobs. ☐
Drivers not desiring to be considered for a position or successful in holding a position will be kept on the master layoff list from which additional positions will be filled.

We would like the return of this letter within 7 days if at all possible.

CLERK U.S. DISTRICT COURT

Exhibits:

P 13 D Y 11

Case No. 20374-4

Yours very truly

/s/ Harold E. Melton
Harold E. Melton
V.P.—Industrial Relations

HEM/sj

cc: Local Union

P.S. A self-addressed envelope is enclosed for your convenience.